

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Estate of MYLO HARVEY, and DIANE  
HENRY, as the personal representative of  
the Estate,

Plaintiffs,

v.

KEITH JONES, BENJAMIN KALICH,  
CLYDE TURNER, JOHN DOES ONE  
THROUGH TEN, and CITY OF EVERETT,

Defendants.

CASE NO. C05-1170RSM

MEMORANDUM ORDER  
DENYING PLAINTIFF'S CROSS  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
AGAINST OFFICERS JONES AND  
KALICH

**I. INTRODUCTION**

This matter comes before the Court on plaintiff's Cross-Motion for Summary Judgment against Officers Jones and Kalich. (Dkt. #25). Plaintiff argues that she is entitled to summary judgment on her excessive force claim, and on her claim that, by attacking Mr. Harvey, Officer Jones and Officer Kalich intentionally or recklessly provoked the ensuing physical struggle between her son and several police officers, and that such provocation was a proximate cause of her son's injuries and his eventual death.

Defendants argue that plaintiff's motion should be denied because it relies on the same evidence and arguments presented in the context of defendants' motion for summary judgment.

1 For the reasons set forth below, the Court agrees with defendants, and hereby DENIES  
2 plaintiff's cross motion for partial summary judgment.

## 3 **II. DISCUSSION.**

### 4 **A. Background**

5 The Court has already set forth the essential facts of this case in its Order on defendants'  
6 motion for summary judgment, and therefore, will not repeat them here. However, the Court  
7 notes that on the instant motion, the Court now views the facts most favorably to defendants.

### 8 **B. § 1983 Civil Rights Violations**

9 As noted above, plaintiff alleges violations of Mr. Harvey's civil rights under 42 U.S.C. §  
10 1983, based on excessive force during arrest, failure to train and failure to provide prompt  
11 medical treatment. (Dkt. #1 at 5-6). Plaintiff's instant motion focuses only on the excessive  
12 force claim, and apparently only with respect to Officers Jones and Kalich.

13 To prevail on her claim, plaintiff must prove that defendants acted under color of law  
14 and deprived plaintiffs of a constitutionally-protected right. 42 U.S.C. § 1983; *Jensen v. City of*  
15 *Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998) (citing *Wood v. Ostrander*, 879 F.2d 583, 587  
16 (9th Cir. 1989)). Accordingly, to successfully defend against summary judgment, defendants  
17 must demonstrate that there is a genuine issue of material fact as to whether reasonable force  
18 was used during Mr. Harvey's arrest. For the reasons set forth below, the Court finds that  
19 defendants have raised such material facts.

#### 20 *I. Excessive Force*

21 As explained in this Court's Order on defendants' motion for summary judgment, a  
22 Fourth Amendment claim of excessive force is analyzed under the framework outlined by the  
23 United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In that case, the  
24 court instructed that all claims that law enforcement officers have used excessive force in the  
25 course of an arrest must be analyzed under the Fourth Amendment and its "reasonableness"  
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1 standard. *See Graham*, 490 U.S. at 395; *Smith v. City of Hemet*, 394 F. 3d 689, 700 (9th Cir.  
2 2005); *Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1992) (as amended). That analysis  
3 requires balancing the “nature and quality of the intrusion” on a person’s liberty with the  
4 “countervailing governmental interests at stake” to determine whether the use of force was  
5 objectively reasonable under the circumstances. *Graham*, 490 U.S. at 396.

6 The Supreme Court further instructed that “the ‘reasonableness’ inquiry in an excessive  
7 force case is an objective one: The question is whether the officers’ actions are ‘objectively  
8 reasonable’ in light of the facts and circumstances confronting them[.]” *Id.* at 397 (citations  
9 omitted); *see, e.g., Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001). “The  
10 question is not simply whether the force was necessary to accomplish a legitimate police  
11 objective; it is whether the force used was reasonable in light of *all* the relevant circumstances.”  
12 *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (*en banc*) (emphasis in original).

13 The Court has thoroughly discussed the *Graham* analysis in its previous Order, and does  
14 not intend to repeat the entire discussion here. Instead, the Court relies on the assessment of  
15 force set forth in the same Order. However, viewing the facts in the light most favorable for  
16 defendants, the Court now finds that defendants have raised genuine issues of material fact with  
17 regard to the reasonableness of the force used, and therefore finds that summary judgment in  
18 favor of plaintiff is not appropriate.

19 In the instant case, the record indicates that Mr. Harvey was not armed, but may have  
20 posed a threat to himself and others while he wandered, yelling and screaming, in the middle of a  
21 busy street. Although Mr. Harvey was only a 5 foot 6 inch, 119 pound, nineteen year old, the  
22 drugs he had taken apparently caused him to have above-average strength, enough that he was  
23 able to break free from officers throughout the struggle. The responding officers all describe  
24 Mr. Harvey’s actions as combative, and Officer Jones states that Mr. Harvey was acting  
25 combatively when Mr. Harvey attempted to enter his police car. Furthermore, the responding  
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1 officers all testify that Mr. Harvey did attempt to flee the scene.

2 Thus, the Court concludes that in light of these facts, a rational jury could find that Mr.  
3 Harvey posed an immediate safety threat to the officers or bystanders, and that the officers' use  
4 of force was necessary to subdue him. Accordingly, the Court finds that the question of whether  
5 the force used in this case was reasonable raises issues of material fact that must be resolved by  
6 a jury. Therefore, summary judgment in favor of plaintiff on this issue is not appropriate.

## 7 2. *Alexander Creation of Danger Claim*

8 The Court now turns to plaintiff's claim that by attacking Mr. Harvey, Officer Jones and  
9 Officer Kalich intentionally or recklessly provoked the ensuing physical struggle between Mr.  
10 Harvey and several police officers, and that such provocation was a proximate cause of Mr.  
11 Harvey's injuries and subsequent death. Plaintiff bases her claim on the Ninth Circuit Court of  
12 Appeals' decision in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir.  
13 1994), in which, plaintiff asserts, the court recognized this type of excessive force claim for the  
14 first time.

15 The *Alexander* case arose from an incident in which police officers shot and killed a man  
16 inside his home. In June of 1990, the San Francisco Health Department had received a  
17 complaint from a neighbor of Henry Quade that sewage was seeping from Quade's basement  
18 into the street and into the foundation of the neighbor's house, and that Quade's backyard was  
19 filled with refuse. After many attempts to contact Quade, both in person and by mail, and after  
20 several failures on Quade's part to appear for abatement hearings, a municipal court judge issued  
21 a forcible entry warrant, which authorized the inspection of Quade's home through forcible entry  
22 if necessary. *Alexander*, 29 F.3d at 1357-58.

23 On October 16, 1990, Public Health officials went to Quade's home to execute the  
24 forcible entry warrant, accompanied by a police sergeant. That police sergeant, finding that  
25 Quade's door had been nailed shut, moved aside a piece of cardboard covering a window.  
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1 Quade called from inside “I’m going to get my gun and use it.” *Id.* at 1358. The sergeant then  
2 radioed for reinforcements. A tactical team arrived, as well as a team of hostage negotiators.  
3 The hostage negotiators had learned by that time that Quade was mentally unstable, elderly,  
4 overweight, and nearly blind. *Id.*

5 The police cordoned off the area around Quade’s house, and a member of the hostage  
6 negotiating team tried to talk to Quade, but he did not respond. After approximately one hour,  
7 a police captain at the scene formulated a plan to enter the house and take Quade into custody.  
8 Two officers on the tactical squad broke down the door with a battering ram, and seven others  
9 entered the house. Five of the seven officers entered with guns drawn. *Id.* Quade appeared at  
10 the top of a staircase inside the home holding a .22 caliber handgun. The officers ordered him to  
11 drop the gun. However, rather than doing so, Quade said, “I told you I was going to use it,”  
12 and pulled the trigger. The officers shot back, and Quade died from gunshot wounds shortly  
13 thereafter. His own gun had apparently misfired, and none of the officers were hurt. *Id.*

14 Quade’s mother then brought a lawsuit against various defendants raising, *inter alia*, a  
15 claim of excessive force pursuant to § 1983. Specifically, she argued

16 that it was unreasonable for the officers to storm the house of a man whom  
17 they knew to be a mentally ill, elderly, half-blind recluse who had threatened  
18 to shoot anybody who entered. Plaintiff does not argue that once Quade  
19 pointed his gun at the officers and pulled the trigger, the officers used  
unreasonable force in shooting to kill. Rather, plaintiff argues that defendants  
used excessive force in creating the situation which caused Quade to take the  
actions he did.

20 *Id.* at 1366. In the instant case, plaintiff now asserts that she is raising the same type of  
21 *Alexander* claim, and that summary judgment in her favor is appropriate. The Court disagrees.

22 In *Alexander*, the Court of Appeals specifically stated that plaintiff’s claim, “if supported  
23 by the evidence, states a classic Fourth Amendment violation under *Graham v. Connor*. . . .” *Id.*  
24 (complete citation for *Graham* omitted). The court further noted that the analysis for such a  
25 claim follows the traditional excessive force analysis set forth in *Graham*, explaining “under both  
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1 *Graham* and the excessive force cases from this circuit, [the circumstances confronting officers,  
2 under which a court would determine reasonableness] include ‘the severity of the crime at issue,  
3 whether the suspect poses an immediate threat to the safety of the officers, and whether he is  
4 actively resisting arrest or attempting to evade arrest by flight.’” *Id.* (citation omitted).

5 As explained above, this Court has already completed a *Graham* analysis of the instant  
6 case, and has determined that the reasonableness of the force applied by officer defendants  
7 requires the resolution of material factual questions by the jury. Accordingly, the Court finds  
8 that summary judgment in favor of plaintiff is not appropriate on her *Alexander* creation of harm  
9 claim.

### 10 **III. CONCLUSION**

11 Having reviewed plaintiff’s cross motion for partial summary judgment (Dkt. #25),  
12 defendants’ opposition (Dkt. #33), plaintiff’s reply (Dkts. #34), the declarations and evidence in  
13 support of those briefs, and the remainder of the record, the Court hereby ORDERS:

14 (1) Plaintiff’s cross motion for partial summary judgment (Dkt. #25) is DENIED in its  
15 entirety.

16 (2) The Clerk shall forward a copy of this Memorandum Order to all counsel of record.

17 DATED this 6th day of April, 2006.

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20 RICARDO S. MARTINEZ  
21 UNITED STATES DISTRICT JUDGE  
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